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IN THE

Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should courts be allowed to consider the competing interests of the parties when deciding whether to enforce a federal grand jury subpoena seeking foreign-located materials brought into the United States through compulsory civil process and in reliance on the confidentiality protections granted by a civil protective order?

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INTEREST OF THE AMICUS CURIAE[1]

The Washington Legal Foundation (WLF) is a nonprofit, public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly initiates litigation, files *amicus curiae* briefs, and publishes monographs and other publications on these and related topics. WLF has regularly appeared as *amicus curiae* before this Court and numerous other federal and state courts in cases raising issues of special importance to the business community. *See, e.g., Morrison v. Nat'l Austrl. Bank Ltd.*, 130 S.Ct. 783 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

WLF agrees with Petitioner that the extraordinary per se rule adopted by the Ninth Circuit warrants further review by this Court. The question presented in this case, whether a grand jury subpoena always trumps a civil protective order, involves legal issues of fundamental importance to the business community and the national economy. Most particularly, WLF is concerned that categorically disregarding civil protective orders in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amicus* provided counsel for Respondent with notice of intent to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of Court.

favor of grand jury subpoenas will burden the relationship between a company and its counsel. The rule also inhibits a company's ability to defend itself in the civil matter in which the protective order was issued by forcing the company's executives to either risk incriminating themselves or broadly assert the Fifth Amendment privilege, leading to adverse inferences in the civil matter.

As *amicus curiae*, WLF believes that the arguments set forth in this brief will assist the Court in determining and resolving the issues presented by the Petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

Plaintiffs brought the underlying antitrust class action against the makers of flat panel displays after the Department of Justice (DOJ) opened a criminal antitrust investigation into the same conduct. *See* Pet. 5 ("DOJ conceded that its grand jury investigation caused the Class Actions"). The Department of Justice intervened in the civil action to stay discovery while its criminal investigation proceeded. *Id.* at 5-8. DOJ argued for the stay on two grounds: (1) the parties in the civil action might discover information about the criminal investigation and (2) allowing civil discovery to proceed in tandem with the grand jury investigation could put employees of the companies under investigation in the "untenable position of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition,

with the negative inference that comes with that decision, or testifying in a civil deposition and running the risk of self-incrimination in the criminal matter." Pet. App. 4a-5a.

The district court ultimately allowed limited discovery to proceed and entered a protective order strictly limiting the use of any discovery materials to "prosecuting, defending, or attempting to settle *this* [civil] action." *Id.* at 5a (emphasis added). The protective order also allowed DOJ to review certain materials, but it expressly prohibited DOJ's use of civil discovery materials in the grand jury investigation. Pet. 7.

With the protective order in place, the district court compelled the defendants to bring foreign-located evidence into the United States to respond to discovery demands. Pet. App. 12a-13a. (Such evidence is referred to throughout this brief as "foreign discovery materials.") DOJ eventually sought copies of these foreign discovery materials for use in the grand jury investigation. First, DOJ sought to modify the discovery plan to allow it to copy the foreign discovery materials. The district court, with the assistance of a special master, weighed the competing considerations of the DOJ and the civil litigants, who sought to shield the foreign discovery materials from the grand jury. The court ordered the parties to allow DOJ to review the foreign discovery materials, but denied DOJ's request to copy them. *Id.* at 9a-10a. Subsequently, DOJ served a grand jury subpoena on counsel demanding production of the foreign discovery materials, which by that time resided with the defendants' attorneys in the United States. Pet. 11-12.

On a motion to quash the grand jury subpoena, the district court again weighed the competing considerations, and ordered the grand jury subpoena quashed. The court continued to allow the DOJ to review, but not copy, the foreign discovery materials. Pet. App. 4a-7a.

On appeal, the Ninth Circuit was constrained by its per se rule favoring the enforcement of grand jury subpoenas over civil protective orders. (That rule is referred to throughout this brief as the "per se rule.") As a result, the appellate court did not consider the interests of the parties, but instead issued a brief opinion relying on its per se rule to reverse the district court. *Id.* at 1a-3a.

The per se rule is one of three approaches adopted by the courts of appeals in cases where a grand jury subpoena conflicts with a civil protective order. Of the three approaches, only the per se rule prevents judges from fashioning a result after considering the facts in the cases before them. The per se rule requires district courts to always give precedence to grand jury subpoenas over Rule 26(c) protective orders. Other circuits that have decided this issue have given their district courts varying degrees of discretion to consider the circumstances of the case before them when deciding whether it is appropriate to enforce a grand jury subpoena seeking material subject to a civil protective order.

In the Second Circuit, a party is "entitled to rely upon the enforceability of a protective order against any third parties, including the Government."[2] But a protective order may be

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[2] *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296-97 (2nd Cir. 1979).

modified if required by an "extraordinary circumstance or compelling need."[3] *Martindell* expresses a particular concern that judges should be able to use Rule 26(c) protective orders to encourage deponents to provide testimony. According to the Court, witnesses rely on protective orders and they will "frequently...refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." 594 F.2d at 295-96.

In the First Circuit[4] and Third Circuit,[5] there is a presumption in favor of the enforceability of grand jury subpoenas seeking material protected by a civil protective order. The party who faces disclosure can overcome the presumption by demonstrating "exceptional circumstances that clearly favor" honoring the court's commitment to protect the materials. *Roach*, 138 F.3d at 445. According to the First Circuit, the proper course incorporates the "desired flexibility" of the *Martindell* rule and leaves room for "reasoned analysis" of the circumstances at hand. *Id.*

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[3] Id. at 296.

[4] *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998) (holding that a grand jury subpoena trumps a protective order unless the party "seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances").

[5] *In re Grand Jury*, 286 F.3d 153, 165 (3rd Cir. 2002) ("a grand jury subpoena supercedes a protective order unless the party seeking to quash the subpoena can demonstrate exceptional circumstances.")

REASONS FOR GRANTING THE PETITION

Parallel criminal and civil proceedings are a frequent phenomenon whenever the government investigates allegations of misconduct by businesses. Increasingly, criminal antitrust and securities investigations are followed by civil complaints focusing on the same alleged misconduct.[6] This trend is spreading to other areas.[7] Such parallel proceedings are often brought as putative class actions,[8] which increase both the potential discovery costs and the potential damages facing corporate defendants.[9] Corporations seeking to defend

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[6] *See* Pet. App. 6a ("It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery.")

[7] For example, although the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78 dd-1, et seq., provides no private right of action, enterprising plaintiffs have brought shareholder derivative suits based on the same conduct as government FCPA investigations. *See* James G. Tillen & Lauren H. Torbett, *Multiplying the Risks: Parallel Civil Litigation in FCPA Investigations*, 2 Bloomberg L. Rep. – White Collar Crime, No. 10, 2010.

[8] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 681 (1986) (describing the increased trend of plaintiff's attorneys seeking out clients in order to "piggyback on a prior governmental proceeding," such as a federal grand jury investigation into violations of antitrust law); *see also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1 (2000).

[9] *See Twombly*, 550 U.S. at 558 (discussing the expensive nature of antitrust litigation).

themselves in parallel proceedings are faced with extremely complicated legal issues that require access to sophisticated legal advice. *See, e.g.*, Paul L. Friedman & Craig Alan Wilson, *Representing Foreign Clients in Civil Discovery and Grand Jury Proceedings*, 26 Va. J. Int'l L. 327 (1985) [hereinafter Friedman & Wilson, *Representing Foreign Clients*].

Multinational corporations facing parallel proceedings confront the added complication and expense of having relevant information and evidence overseas.[10] Given the complexity of the legal issues facing multinational corporations defending themselves in parallel proceedings, it is imperative that corporate representatives be able to speak freely with their legal counsel. Legal advice is often needed not only by the corporation, but also by its employees, who may themselves become subjects of the criminal investigation.

WLF believes the per se rule adopted by the Ninth Circuit will chill the relationship between a multinational corporation and its legal advisors when the corporation is facing parallel proceedings. If the corporation alerts its lawyers to foreign-located information that may be relevant to the civil proceeding, the corporation may unwittingly cause that information to come within the jurisdiction of the grand jury. If the corporation does not alert its lawyers regarding such foreign-located information, it will lose the ability to obtain candid legal advice

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[10] *See, e.g.*, Friedman & Wilson, *Representing Foreign Clients, supra*, at 357-79 (discussing the myriad considerations facing lawyers who represent foreign clients, particularly companies, in parallel proceedings involving a grand jury, and analyzing the options of counsel in advising foreign clients about cooperation, candor, and the Fifth Amendment.)

about that information and will limit its counsel's effectiveness in both the civil and criminal proceedings.[11]

Moreover, the per se rule will unfairly limit a corporation's ability to provide discovery in the civil matter. A corporation may want its foreign-based executives to provide testimony in the civil matter, but if such testimony can come within the jurisdiction of the grand jury, foreign-based employees may refuse to provide testimony for fear of criminal jeopardy. *See generally,* Friedman & Wilson, *Representing Foreign Clients, supra,* at 348-57.

Finally, because of the burdens the per se rule places on a multinational corporation's attorney-client relationship, combined with the burdens the rule places on the corporation's ability to provide discovery in the civil case, we believe the rule will pressure corporations to settle cases that lack merit. Such an outcome will only further incentivize plaintiffs to clog the federal courts with increasingly frivolous and far-fetched class action claims.

Yet there is no reason for such an outcome, which is mandated within the Ninth Circuit. Circuit courts of appeals that have addressed the issue have reached different conclusions regarding the enforcement of a grand jury subpoena when faced with a conflicting civil protective order. Pet. 16-23. The approach adopted by the Ninth Circuit -

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[11] *See Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions,* 98 Harv. L. Rev. 1023, 1031-34 (1985) (asserting that parallel proceedings put clients at particular risk of losing the assistance of counsel if materials used by the attorney in the civil action are reachable by the prosecution in the criminal matter).

a per se rule favoring the grand jury subpoena - unnecessarily infringes on the interests of the multinational business community and its employees. Thus, WLF asks the Court to accept the Petition in order to resolve the circuit conflict and give the lower courts guidance on this issue.

ARGUMENT

I. THE PER SE RULE LIMITS THE ABILITY OF MULTINATIONAL BUSINESSES TO DEFEND THEMSELVES IN PARALLEL CIVIL SUITS

Under the Ninth Circuit's rule, when a multinational corporation is compelled to bring foreign-located materials to the U.S. to comply with a civil discovery request, the materials automatically become subject to a grand jury subpoena. Pet. App. 1a. The ability of a multinational business to defend itself in parallel civil and criminal proceedings is severely and unnecessarily limited by such a rule.

(a) The per se rule imposed below unduly burdens the relationship between multinational companies and their counsel

When a multinational corporation is the subject of parallel civil and criminal proceedings in the U.S., it is often true that foreign-located employees, documents, or information may be relevant to the litigation in the U.S. *See* Friedman & Wilson, *Representing Foreign Clients, supra,* at 330-31. Thus, as a threshold matter, such a company generally requires the advice of U.S. counsel on how the foreign-located employees, documents or

information affect the company's defenses in the civil and criminal matters. *See generally id.* (describing the complexity of defending foreign companies in parallel proceedings).

To benefit from the advice of counsel about this foreign-located information, the company must first make its counsel aware of such information. If the corporation discloses to its attorney the existence of foreign-located evidence that may be responsive to civil discovery requests, the attorney may eventually be duty-bound to comply with such requests and produce this foreign-located evidence in the U.S.[12] And if the civil proceeding is underway in a jurisdiction adhering to the per se rule, the foreign-located evidence could then come within the grasp of the grand jury. *See, e.g.*, Pet. App. 1a.

Accordingly, the per se rule creates a dilemma for multinational corporations facing parallel proceedings. If the corporation seeks the advice of counsel regarding foreign-based materials, the client risks putting the information within reach of the grand jury. To avoid this risk, the corporation may feel compelled *not* to provide the information to counsel to prevent it from falling into the hands of the grand jury. Yet, by not providing counsel full access to all relevant information, the company loses the benefit of its lawyer's advice and may jeopardize

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[12] *See, e.g.*, Fed. R. Civ. P. 26(g)(1) (imposing on an attorney a duty to respond to discovery and disclosure requests "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry"). We assume that, as apparently happened in the instant case, the civil plaintiff is able to establish grounds for the court's jurisdiction over the foreign-located evidence.

its defense in both the civil and criminal proceedings.

This Court has long recognized that, unless properly limited, discovery can be used to weaken the attorney-client relationship. For example, a chilling of the attorney-client relationship is precisely the harm that this Court sought to prevent in enunciating the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("[p]roper preparation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.") Likewise, concern over chilling the attorney-client relationship animates the policies of the American Bar Association and the DOJ, discussed *infra*, which seek to sharply limit the circumstances in which document subpoenas can be served on a lawyer.

The per se rule's burdens on the attorney client relationship are apparent in the case below. The companies involved sought the benefit of advice from counsel about foreign-located documents and employees relevant to the matter. When it became apparent that some of that foreign-located information might be implicated by discovery requests in the civil case, counsel took steps to preserve the confidentiality of the information. First, the parties to the civil action sought and obtained a protective order. Pet. at 8. Then, when production of some of the foreign-located evidence was compelled in the civil case, counsel for the foreign defendant took possession of the foreign discovery material to ensure that it would not be disseminated beyond what was required in the civil matter. Pet. 11-12.

Under the discovery plan in the civil matter, the DOJ was able to review, but not copy, the foreign discovery material. Pet. App. 5a. Apparently, DOJ determined that some of the material would be useful to the grand jury investigation. Ordinarily, when DOJ wants to present foreign-located evidence to a grand jury, it uses one of the methods the U.S. has established through treaties with foreign governments for obtaining such information.[13] Yet in this case, DOJ took the extraordinary step of serving counsel with grand jury subpoenas demanding counsel produce the foreign discovery materials.[14]

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[13] Pet. 31-32. Respondent has previously recognized the comity concerns raised by tenuous claims of extra-territorial jurisdiction by U.S. courts. Writing as amicus for the petitioner in *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76 (argued Jan. 11, 2011), the U.S. noted that a U.S. court's attempt to exercise jurisdiction over a foreign company that did not fall within the court's traditional jurisdiction could "be particularly damaging to the United States' foreign trade relations," and create "obvious disincentive for foreign manufacturers to allow their goods to be distributed in the United States." Brief for the United States as Amicus Curiae Supporting Petitioners at 30-31, *Goodyear Luxembourg Tires, S.A. v. Brown*, (No. 10-76) (U.S. filed Nov. 19, 2010), 2010 WL 4735597; *see also Laker Airways Ltd. v. Pan Am. World Airways*, 607 F. Supp. 324, 327 (S.D.N.Y. 1985) (noting that "extraterritorial jurisdiction asserted over foreign interests by the American antitrust laws has long been a sore point with many foreign governments"); *Phila. Gear Corp. v. Am. Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983) (requiring a civil plaintiff to use the Hague Evidence Convention and noting that "the proper exercise of judicial restraint requires that the avenue of first resort...be the Hague Convention.")

[14] It is ironic that DOJ is now seeking civil discovery material for the grand jury investigation since one of the government's initial justifications for intervening in the civil

Both the Department of Justice[15] and the American Bar Association ("ABA")[16] caution against subpoenas directed to counsel. Their reasoning is simple: subpoenas that direct attorneys to disclose and produce materials from their clients' files have a chilling effect on the attorney-client relationship.[17] The government will be particularly tempted to use these disfavored subpoenas in cases like this one, where it is easier for the grand jury to access the materials with a foray into a lawyer's file cabinet than to use other, more appropriate means.

The ABA and the United States Department of Justice have adopted similar policies disfavoring subpoenas directed to attorneys. *See* USA Manual § 9-13.410; Model Rules of Prof'l Conduct R. 3.8(e); Am. Bar. Assoc. 122B. Out of a concern for "potential effects upon an attorney-client relationship," the U.S. Attorney's manual requires the Assistant Attorney General to authorize subpoenas served on attorneys "relating to the attorney's representation of a client." USA Manual §

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matter was to prevent the civil discovery from interfering with the criminal investigation. Pet. App. 4a-5a.

[15] *See* United States Dep't. of Justice, *United States Attorney's Manual* § 9-13.410 (2009) (hereinafter USA Manual § 9-13.410) (requiring that all reasonable attempts to obtain the materials from an alternative source be undertaken before a subpoena is issued to an attorney).

[16] Am. Bar Assoc., 122B, *Criminal Justice Section Report to the House of Delegates: Recommendation* (1987) (hereinafter Am. Bar Assoc. 122B).

[17] Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of a Prosecutor*, 22 Geo. J. Legal Ethics 463, 490 (2009).

9-13.410(A). Like the ABA rules, the U.S. Attorney's manual instructs Assistant U.S. Attorneys to exhaust "all reasonable attempts" to get the materials from alternative sources. USA Manual § 9-13.410(B).

The justification for these rules, simply stated, is that the attorney-client relationship is "critical to our system of justice," and the likelihood of chilling that relationship is high when the government can compel production of an attorney's files. *See, e.g., United States v. Bergeson*, 425 F.3d 1221, 1226-27 (9th Cir. 2005). Allowing the grand jury to subpoena evidence held by counsel may cause clients to selectively censor their communications with their lawyer about their case, fail to disclose the existence of some materials, and conceal certain documents from their lawyer because the lawyer may later be subpoenaed. *See, e.g., Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions, supra* note 11, at 1031-34.

(b) The Ninth Circuit's per se rule limits a multinational corporation's ability to obtain cooperation from its employees in defending the civil matter

In addition to burdening the relationship between a multinational corporation and its attorney, the per se rule limits a multinational corporation's ability to mount a robust defense in a civil matter with a parallel criminal proceeding. In civil antitrust matters, employees of the corporation are frequently served subpoenas for testimony. In a jurisdiction that uses the per se rule, a civil protective order cannot be relied upon to maintain

the confidentiality of deposition testimony – transcripts of such testimony are subject to subpoena by the grand jury. *See, e.g., In re Grand Jury Proceedings*, 995 F.2d 1013, 1020 (11th Cir. 1993). Thus, foreign-located employees who are outside the jurisdiction of the grand jury may be reluctant to testify in the civil matter.[18] *See* Friedman & Wilson, *Representing Foreign Clients, supra*, at 350-51 (noting the option of foreign witnesses not to comply with domestic civil discovery requests).

A company that needs to include the testimony of its foreign-located employees to properly defend a parallel civil matter will face a Hobson's choice in a per se jurisdiction. If the employee, knowing the transcript of his testimony may be subject to grand jury subpoena, refuses to submit his or her testimony, the corporation may face civil sanctions. *See* Fed. R. Civ. P. 37(b) (providing sanctions for a party that fails to produce a person for examination). If the employee submits to a deposition, the testimony may later be used against either the employee or the corporation in the criminal grand jury proceedings. *See generally United States v. Williams*, 504 U.S. 36, 48-50 (1992)

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[18] While U.S.-based employees may also be reluctant to testify in a civil matter when there is a parallel grand jury investigation, the interests are different. A protective order offers limited protection to a U.S.-based employee who, presumably, is within the jurisdiction of the grand jury. For a foreign-based employee, outside the jurisdiction of the grand jury, the protection provided by a civil protective order could have a much greater impact on the employee's decision to testify in the civil matter.

(describing the broad range of evidentiary materials that can be presented to the grand jury).

But even if the foreign-located employee submits to a deposition, he may feel the need to invoke his Fifth Amendment right against self-incrimination. While this will offer the employee some protection in the criminal investigation, it will leave the corporation with a negative inference in the civil case. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (it is permissible to draw an adverse inference in a civil proceeding against someone who exercises his Fifth Amendment right not to testify in that proceeding.); Pet App. at 5a; *see also* Charles H. Rabon, Jr., Note, *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment*, 42 Vand. L. Rev. 507 (1989) (describing the inherent unfairness in burdening a defendant with a negative inference when nonparties invoke their Fifth Amendment right).

In jurisdictions that do not apply a per se rule, judges are able to balance the competing interests involved. *See, e.g., Martindell*, 594 F.2d at 296 ("After balancing the interests at stake, we are satisfied that, absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation." (citations omitted)). A foreign-located deponent would still have to weigh the relative merits of testifying in the civil case, but

deponents undoubtedly will be more likely to agree to testify if they know that their testimony is not automatically within a grand jury's reach.

If judges are allowed to weigh crucial factors such as the party's reliance on a protective order when it provided foreign-located evidence in discovery[19] and whether the information sought would ordinarily be within the jurisdiction of the grand jury,[20] defendants and their employees could agree to the depositions of foreign-located witnesses without fear of automatic negative repercussions in the concurrent criminal matter.[21]

(c) The Ninth Circuit's per se rule will lead companies to settle parallel civil cases regardless of the merits of the claims presented

Because the per se rule favoring grand jury subpoenas, when applied to a multinational corporation facing parallel proceedings, burdens the attorney-client relationship and makes it difficult to defend the civil matter, it creates a perverse incentive for such corporations to settle the civil

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[19] *See* Pet. App. at 11a-15a (considering the reliance on the part of the defendants in this case on the protective order).

[20] *See id.* (noting that DOJ should not be allowed to "overstep its power" in the instant matter).

[21] Even in jurisdictions that do not adhere to the per se rule, foreign-located employees may still be reluctant to testify in the civil matter. Presumably, though, as the likelihood of an employee's testimony being subject to grand jury subpoena decreases, the likelihood that the employee will agree to testify increases. Thus, the rule in *Martindell* would provide the greatest freedom for corporations to defend themselves with the testimony of their employees.

matter, no matter what.[22] As Petitioner points out, the incentives to settle in a per se jurisdiction often exist regardless of the merits, or lack thereof, of the civil cause of action.[23]

If plaintiffs are allowed to use the enormous leverage provided by the per se rule to obtain "in terrorem" settlements from companies, the already voluminous civil docket of parallel civil cases filed following the announcement of a grand jury investigation is bound to explode.[24] The dockets of U.S. federal courts should not be clogged by meritless causes of action that use the per se rule as

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[22] The burden placed on the attorney-client relationship by the per se rule is likely to have other consequences as well. For example, district courts in per se jurisdictions, cognizant of the rule's chilling effect on the attorney-client relationship, may be reluctant to enforce discovery of foreign-located evidence to which civil plaintiffs would otherwise be entitled. Such a result will lead to uneven enforcement of the Federal Rules of Civil Procedure across the country and will give civil plaintiffs another incentive to forum shop. Plaintiffs hoping to discover foreign-located evidence will find ways to establish venue in jurisdictions that do not adhere to the per se rule.

[23] "As this Court has observed, such collateral consequences of broad civil discovery can cause defendants 'to settle even anemic cases,'" Pet. at 27 (citing *Twombly*, 550 U.S. at 559).

[24] *Cf.* Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 Law & Soc'y Rev. 237, 247-48 (1992) (drawing conclusions regarding the role of class actions in the federal legal system by observing class actions in the Northern District of California over a seven year period, and noting that entrepreneurial plaintiffs' lawyers spring into action when they discover a grand jury investigation.)

leverage to obtain a windfall from a corporate defendant.[25]

II. LESS BURDENSOME ALTERNATIVES TO THE PER SE RULE EXIST IN OTHER CIRCUITS

When a grand jury issues a subpoena for material covered by a Rule 26(c) protective order, only the per se rule burdens multinational businesses in the ways described above. As other courts have recognized, although the grand jury vindicates an important law enforcement interest by ensuring the efficacy of its subpoena power,[26] the civil justice system also has a strong interest in the durability of Rule 26(c) protective orders.[27] When these interests collide, the rules adopted in the other circuits offer less burdensome alternatives to the per se rule.[28]

The Second Circuit was the first court of appeal to decide this issue. In *Martindell*, the Court held that materials produced under civil protective order are generally shielded from the government,

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[25] *See id.* at 268. (noting that follow-on lawsuits "tend to settle...with only a superficial investigation into the merits" and do not contribute to "any deepening of an inquiry...beyond what was known when the cases were filed.")

[26] *See Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

[27] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984).

[28] The inconsistent application of Fed. R. Civ. P. 26(c) by different circuit courts of appeal is itself troubling. This court has previously recognized that "one of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts..." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (citation and internal quotation marks omitted).

unless the government can prove "improvidence in the grant of a Rule 26(c) protective order," "some extraordinary circumstance," or "compelling need." 594 F.2d at 296.

The next three Circuits to consider the question -- the Fourth, the Eleventh and the Ninth Circuits -- all adopted a per se rule favoring enforcement of grand jury subpoenas. The Fourth Circuit announced its per se rule in *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988). In 1993, the Eleventh Circuit also adopted the per se approach, *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1015-20 (11th Cir. 1993), with the Ninth Circuit following suit two years later. *In re Grand Jury Subpoena (Meserve)*, 62 F.3d 1222, 1226 (9th Cir. 1995).

Circuits courts that have considered the question more recently have all declined to adopt a per se rule favoring grand jury subpoenas over civil protective orders. The First and Third Circuits developed a hybrid approach combining aspects of the *Martindell* approach with the per se rule. *Roach*, 138 F.3d at 445-6; *In re Grand Jury*, 286 F.3d at 159-64. These circuits developed approaches allowing judges to consider the interests in the case at hand before deciding whether to enforce a grand jury subpoena for materials shielded by a protective order.[29]

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[29] In the Third Circuit, before the government can obtain an order enforcing a grand jury subpoena, it must demonstrate the propriety of the subpoena, including whether each item sought is within the grand jury's jurisdiction. *See In re Grand Jury Proceedings* (*Schofield*), 486 F.2d 85, 93 (3rd Cir. 1973).

The Tenth Circuit also made clear recently that it would not automatically give the government access to material shielded by a civil protective order. *SEC v. Merrill Scott & Assoc., Ltd.*, 600 F.3d 1262, 1270-75 (10th Cir. 2010). The Court held that although DOJ was generally permitted to provide the Internal Revenue Service access to documents under information-sharing statutes, the Rule 26(c) protective order shielded the information in question. *Id.* at 1273. The Court noted that because of the government's "vast investigatorial resources and power for oppression" courts in the Tenth Circuit have typically required a "greater showing" of "unusual circumstances, or even extraordinary circumstances" when the government seeks to access documents covered by a protective order. 600 F.3d at 1272-73.

Thus, as the case law from other jurisdictions demonstrates, the important law enforcement objectives of the grand jury can be preserved while also ensuring that the interests of civil litigants embodied in protective order are not ignored. While it is true that a per se rule provides certainty, if achieving certainty requires a diminution of both the attorney-client relationship and a company's ability to defend itself, then the cost of certainty is too high. Given the important competing interests at stake when a grand jury issues a subpoena for material covered by a Rule 26(c) protective order, and given the conflict among the circuits, we urge the Court to take this case in order to resolve the conflict and provide guidance to the lower courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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